

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. HARMS, as personal
representative of the Estate of KURT
STANLEY HARMS,

Plaintiff,

v.

LOCKHEED MARTIN CORPORATION,

Defendant.

CASE NO. C06-572JLR

ORDER DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the court on Defendant Lockheed Martin Corporation's ("Lockheed") motion for summary judgment (Dkt. # 40). The court DENIES the motion.

I. BACKGROUND

The relevant facts are not in dispute. In March 2005, Kurt Harms died as the result of injuries sustained in a car crash on an Australian highway. Am. Compl. ¶¶ 3.8-3.15 (Dkt. # 3). He was the passenger in a car driven by Gary Boughton, a Lockheed employee who was acting within the scope and course of his employment. *Id.* ¶ 3.15; Answer ¶ 10 (Dkt. # 10). Plaintiff contends that Mr. Harms' death was the result of Mr. Boughton's negligence. Resp. at 2 (Dkt. # 45).

1 Mr. Harms was unmarried and had no children. *Id.* He was survived by his father,
2 his brother, and his sister, none of whom was dependent on Mr. Harms for financial
3 support. *Id.* His father, Richard Harms, brought this action for tortious death as personal
4 representative for Kurt Harms' estate ("estate"). Am. Compl. ¶¶ 4.1-4.2.

5 The estate concedes that it has no cognizable claims under Washington's wrongful
6 death statutes, RCW §§ 4.20.010 (wrongful death), 4.20.020 (beneficiaries of wrongful
7 death), and 4.24.010 (child death/injury), or the special survival statute, RCW § 4.20.060
8 (death by personal injury), because Mr. Harms left no statutory beneficiaries enumerated
9 in RCW § 4.20.020.¹ Resp. at 3-4. The estate contends, however, that it may still seek
10 economic damages under the general survival statute, RCW § 4.20.046. *Id.*

11 II. ANALYSIS

12 Lockheed moves for summary judgment based on a purely legal question. First,
13 Lockheed argues that the general survival statute, RCW § 4.20.046, disallows suits by a
14 decedent who dies from the injuries that form the basis of the complaint. Mot. at 5-6.
15 Second, Lockheed contends that the general survival statute prohibits recovery by the
16 estate when there are no statutory beneficiaries. *Id.* at 8-10. In effect, Lockheed argues
17 that Washington law prohibits an estate from recovering against a tortfeasor unless the
18 decedent had statutory beneficiaries and died from other causes.

19 The court disagrees. Lockheed misreads the relevant statutes and misconstrues
20 well-settled case law.

21 A. Standard of Review

22 Summary judgment is appropriate if the evidence, when viewed in the light most
23 favorable to the non-moving party, demonstrates there is no genuine issue of material
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27 ¹Effective July 22, 2007, RCW §§ 4.20.020 and 4.20.060 were revised to insert references
28 to state registered domestic partners. See 2007 Wash. Legis. Serv. Ch. 156 (S.S.B. 5336)
(West). The pre-July 2007 versions apply here.

fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). For purely legal questions, summary judgment is appropriate without deference to the non-moving party.

B. Scope of Survival Actions

Lockheed's interpretation of the law would mean that a tortfeasor could negligently kill a person who lacked statutory beneficiaries without being liable to anyone. That tortured logic conflates wrongful death and survival actions, on one hand, and confuses the scope of the general and special survival actions, on the other.

The right to bring tortious death claims is purely statutory. *See Warner v. McCaughan*, 460 P.2d 272, 274 (Wash. 1969)²; *Tait v. Wahl*, 987 P.2d 127, 130 (Wash. Ct. App. 1999). In Washington, these claims may be brought pursuant to the wrongful death statutes, RCW §§ 4.20.010, 4.20.020, 4.24.010, and the survival statutes, RCW §§ 4.20.046 and 4.20.060. *See Otani v. Broudy*, 92 P.3d 192, 194 (Wash. 2004); *Masunaga v. Gapasin*, 790 P.2d 171, 172 (Wash. Ct. App. 1990). The primary differences between wrongful death and survival actions are in (1) the causes of action, and (2) the beneficiaries. *See Otani*, 92 P.3d at 198; Michael M. Martin, *Measuring Damages in Survival Actions for Tortious Death*, 47 Wash. L. Rev. 609, 610 (1972).

The wrongful death statutes create *new* causes of action for statutory beneficiaries of the deceased to recover their own damages. RCW §§ 4.20.010, 4.20.020; *see Otani*, 92 P.3d at 195. In contrast, the survival statutes do not create new causes of action but instead *preserve* causes of action for a decedent's personal representative that the decedent could have maintained had he or she not died. RCW § 4.20.046, 4.20.060; *see Otani*, 92 P.3d at 194-95, 198. The beneficiaries of these preserved claims are either the

²*Warner* remains the seminal case in any discussion of the general survival statute, though its discussion of the proper measure of damages was clarified in *Wooldridge v. Woolett*, 638 P.2d 566, 568-570 (Wash. 1981).

1 decedent's (a) estate (the creditors and the heirs or devisees), or, under certain
 2 circumstances, (b) statutory beneficiaries. RCW § 4.20.046; RCW §§ 4.20.060; *see*
 3 *Otani*, 92 P.3d at 198; *Warner*, 460 P.2d at 276; *Tait*, 987 P.2d at 131 (“[U]nlike the
 4 wrongful death and special survival statutes, the decedent's personal representative can
 5 recover damages under [the general survival statute] on behalf of the decedent's estate.”);
 6 *Martin*, *supra*, at 612.

7 Lockheed makes an unwarranted attempt to impose the requirements of the special
 8 survival statute³ onto the general survival statute.⁴ But the special and general survival
 9 statutes differ as to *which* survival claims are preserved and *who* will collect the
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11 ³In relevant part, the special survival statute provides:

12 *No action for a personal injury to any person occasioning death shall abate, nor*
 13 *shall such right of action determine, by reason of such death, if such person has a*
 14 *surviving spouse or child living, including stepchildren, or leaving no surviving*
 15 *spouse or such children, if there is dependent upon the deceased for support and*
 16 *resident within the United States at the time of decedent's death, parents, sisters, or*
 17 *brothers; but such action may be prosecuted, or commenced and prosecuted, by the*
 18 *executor or administrator of the deceased, in favor of such surviving spouse, or in*
 19 *favor of the surviving spouse and such children, or if no surviving spouse, in favor*
 20 *of such child or children, or if no surviving spouse or such child or children, then in*
 21 *favor of the decedent's parents, sisters, or brothers who may be dependent upon such*
 22 *person for support, and resident in the United States at the time of decedent's death.*

23 RCW § 4.20.060 (emphases added).

24 ⁴In relevant part, the general survival statute provides:

25 *All causes of action by a person or persons against another person or persons shall*
 26 *survive to the personal representatives of the former and against the personal*
 27 *representatives of the latter, whether such actions arise on contract or otherwise, and*
 28 *whether or not such actions would have survived at the common law or prior to the*
 29 *date of enactment of this section: PROVIDED, HOWEVER, That the personal*
 30 *representative shall only be entitled to recover damages for pain and suffering,*
 31 *anxiety, emotional distress, or humiliation personal to and suffered by a deceased on*
 32 *behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are*
 33 *recoverable regardless of whether or not the death was occasioned by the injury that*
 34 *is the basis for the action.*

RCW § 4.20.046(1) (emphases added).

1 decedent's damages. Unsurprisingly, the *special* survival statute is narrow and preserves
2 the decedent's claims for death by the complained of injuries on behalf of statutory
3 beneficiaries. The *general* survival statute is broad and preserves *all* claims on behalf of
4 the estate (as to economic damages) *and* on behalf of statutory beneficiaries (as to certain
5 non-economic damages).

6 In *Warner v. McCaughlin*, the Washington Supreme Court recognized the broad
7 scope of the general survival statute. It found that the special survival statute did not
8 restrict the applicability of the general survival statute because the "legislature was intent
9 on preserving causes of action, rather than pleas of abatement." *Warner*, 460 P.2d at 276
10 (quoting *Engen v. Arnold*, 379 P.2d 990, 993 (Wash. 1963)). It held, therefore, that the
11 estate could recover damages under the general survival statute for a decedent who left
12 behind no statutory beneficiaries and died as the result of the complained of injuries. *See*
13 *id.* at 276-77 (holding that wrongful death action did not apply because there were no
14 statutory beneficiaries). The court noted that, in enacting the general survival statute, the
15 legislature meant for *all* causes of action to survive so that it would not be more profitable
16 for the defendant "to kill the plaintiff than to scratch him," thereby leaving "the bereaved
17 family of the victim . . . without a remedy." *Id.* at 275 (quoting Dean Prosser, Prosser on
18 Torts, § 121, at 924 (3d ed. 1964)); *see Otani*, 92 P.3d at 198 ("Although Washington's
19 wrongful death and survival statutes benefit different parties, they provide recoverable
20 damages for the death or injury of another, depending on the circumstances. Thus it is
21 not cheaper for a defendant to kill, instead of injure, another person in Washington.").

22 "It is well settled law that the estate of a person who dies after birth can maintain a
23 survival cause of action under [the general survival statute]." *Cavazos v. Franklin*, 867
24 P.2d 674, 676 (Wash. Ct. App. 1994) (holding that the estate of a viable, unborn child
25 could recover under general survival statute); *see Criscuola v. Andrews*, 507 P.2d 149,
26 150 (Wash. 1973) (holding that the estate of person who died instantaneously and left no
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1 statutory beneficiaries could recover under general survival statute when death is
2 instantaneous and decedent left no statutory beneficiaries); *Balmer v. Dilley*, 502 P.2d
3 456, 458 (Wash. 1972) (holding that estate of boy who died in car crash could recover
4 damages under general survival statute); *see, e.g., Federated Servs. Ins. Co. v. Personal*
5 *Representative of Estate of Norberg*, 4 P.3d 844 (Wash. Ct. App. 2000) (reviewing the
6 proper measure of damages permissible under general survival statute to estate for
7 decedent who died in head-on collision and left no statutory beneficiaries). The estate's
8 right to recover damages under the general survival statute is limited to the lost net
9 accumulations of the decedent. *See Wooldridge*, 638 P.2d at 570; *Norberg*, 4 P.3d at
10 848; *Tait*, 987 P.2d at 131-32.

11 Thus, Lockheed's arguments must fail unless it can show that the legislature has
12 restricted damages available to decedents' estates under the general survival statute or the
13 courts have overturned well-settled case law.

14 **C. Injuries Causing Death**

15 Lockheed argues that because the special survival statute applies only to actions
16 brought by a personal representative on behalf of statutorily designated beneficiaries for
17 injuries that cause the decedent's death, the general survival statute contains a similar
18 limitation, i.e., it applies *only* to "actions brought by a personal representative on behalf
19 of the estate for injuries suffered by a decedent that did not cause the decedent's death."
20 Mot. at 5 (quoting *Higbee v. Shorewood Osteopathic Hosp.*, 711 P.2d 306, 309 (Wash.
21 1985)). Lockheed contends that the estate cannot recover here because Kurt Harms died
22 from the injuries sustained in a car crash and those injuries serve as the basis of the
23 complaint. The court rejects this evisceration of the general survival statute.

24 The general survival statute was enacted to rectify the anomaly of it being "more
25 profitable for the defendant to kill the plaintiff than to scratch him." *See Warner*, 400
26 P.2d at 275 (citation omitted). Only in a looking-glass world would a statute that
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1 specifies that “[a]ll causes of action . . . shall survive,” RCW § 4.20.046(1) (emphasis
2 added), actually exclude actions for injuries that led to death. The *Higbee* court never
3 carved out such a categorical exclusion. See *Higbee*, 711 P.2d at 309 (noting that “[t]he
4 general survival statute . . . applies to” actions for injuries not leading to death, but that
5 “[t]he special survival statute . . . applies only to” actions for injuries leading to death)
6 (emphases added).

7 The *Higbee* court relied upon *Walton v. Absher Constr. Co.*, 676 P.2d 1002, 1004
8 (Wash. 1984), for its description of the general survival statute’s scope. In *Walton*, the
9 Washington Supreme Court explicitly approved the *Warner* court’s reconciliation of the
10 general and survival statutes. *Id.* (noting that the court was presented with the “flip side
11 of the issue before the *Warner* court,” i.e., whether the general survival statute implicitly
12 restricted recovery of non-economic damages under the special survival statute). The
13 *Warner* court permitted the estate of a woman who left no statutory beneficiaries to
14 recover under the general survival statute for damages arising out of her death. See
15 *Warner*, 460 P.2d at 276.

16 Read in proper context, the *Higbee* court stated no more than that *unlike* the
17 special survival statute, the general survival statute applies to actions for injuries not
18 leading to death. Cf. RCW § 4.20.046(1) (noting that statutory beneficiaries may *also*
19 recover certain non-economic damages “whether or not the death was occasioned by the
20 injury that is the basis for the action”). The same holds true for Lockheed’s citation to
21 *Otani ex rel. Shigaki v. Broudy*. See *Otani*, 92 P.3d at 195-96 (noting that estate could
22 recover for lost net accumulations and not restricting such damages only to injuries that
23 caused death). The court rejects Lockheed’s suggestion that the general survival statute
24 applies *only* where the decedent’s injuries did not cause the decedent’s death. “Were we
25 to read [the general survival statute] so restrictively, the estate of a decedent with no
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1 surviving statutory beneficiaries could not recover injuries which caused the decedent's
2 death" *Vail v. Toftness*, 753 P.2d 553, 555 n.1 (Wash. Ct. App. 1988).

3 **D. Recovery by the Estate**

4 Lockheed argues that the general survival statute requires that Kurt Harms be
5 survived by statutory beneficiaries in order for the *estate* to recover on his behalf. Reply
6 at 2-7. Its theory is based on its misreading of the statute's language and case law dicta.

7 Lockheed argues that the following language from the general survival statute
8 supports its position: "PROVIDED, HOWEVER, That the personal representative shall
9 only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or
10 humiliation personal to and suffered by a deceased on behalf of those beneficiaries
11 enumerated in RCW 4.20.020" RCW § 4.20.046(1). But this language, added in a
12 1993 amendment to the statute, was an *expansion*, not a contraction, of damages available
13 under the general survival statute.

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15 Prior to 1993, recovery for non-economic damages such as pain and suffering was
16 available to statutory beneficiaries under the special survival statute but was not available
17 to *anyone* under the general survival statute. *Compare* 1961 Wash. Laws Ch. 137, § 1
18 *with* RCW § 4.20.046 *and* RCW § 4.20.060. Thus, statutory beneficiaries could not
19 recover for non-economic damages if the decedent died, for example, of old age during
20 the pendency of their personal injury case. This loophole rewarded insurance managers
21 who delayed settlements with elderly victims: they would pay less if the injured party
22 died. *See* House Bill Report, SB 5077, at 1-2, reported by House Committee on Judiciary
23 (1993). The legislative history shows that the 1993 amendment was meant to close this
24 loophole by permitting statutory beneficiaries to recover those non-economic damages
25 under the general survival statute. *See id.* That is, because the general survival statute
26 encompassed *all* survival actions, whether the person died or not, the legislature found it
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1 an expeditious way to afford a certain class of beneficiaries the same kind of damages
2 afforded under the special survival statute.

3 The legislature never indicated the intent to curtail recovery of purely economic
4 damages by the estate. Both pre- and post-1993, the estate is not entitled to recover *non-*
5 *economic damages* (pain and suffering, etc.) on behalf of the decedent. *Compare* 1961
6 Wash. Laws Ch. 137, § 1 *with* RCW § 4.20.046. The legislature expanded the general
7 survival statute's scope and left the estate's right to recovery alone. *See* House Bill
8 Report, SB 5077, at 1-2.

9 Lockheed relies upon generalized dicta to reach the contrary position. For
10 example, in *Philippides v. Bernard*, 88 P.3d 939, 944 (Wash. 2004), the court stated:
11 "Washington's four interrelated statutory causes of action for wrongful death and survival
12 each require that parents be 'dependent for support' on a deceased adult child in order to
13 recover. *See* RCW 4.20.010 (child injury/death) [sic]⁵; RCW 4.20.020 (wrongful death);
14 RCW 4.20.046 (general survival statute); RCW 4.20.060 (special survival statute)." *See,*
15 *e.g., Schumacher v. Williams*, 28 P.3d 792, 797 (Wash. Ct. App. 2001) (examining child
16 injury/death statute but noting that "the beneficiaries under both the survival of action
17 provisions and the wrongful death statute have not included siblings or parents who are
18 not dependent on the decedent for support").⁶ There is no further discussion of the
19 general survival statute. In only one of the cases cited by Lockheed did a court hold that
20 the personal representative could not maintain an action under the general survival statute
21 because the decedent lacked statutory beneficiaries. *See Rentz v. Spokane County*, 438
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24 ⁵The child injury/death statute is at RCW 4.24.010. The wrongful death statute is RCW
25 4.20.010 and the beneficiaries for a wrongful death action are set forth in RCW 4.20.020.

26 ⁶Lockheed cites *Masunaga v. Gapasin* in support of its argument, but the case undermines
27 its position. First, *Masunaga* addressed the child injury/death statute, RCW 4.24.010, which is
28 not applicable here. *Masunaga*, 790 P.2d at 172. Second, the estate's claims were not before the
court because they had been settled beforehand. *Id.*

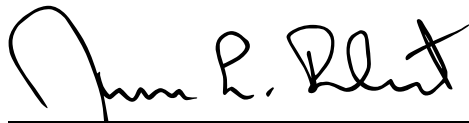
1 F. Supp. 2d 1252 (E.D. Wash. 2006). In that decision, the court referred to the broad
2 summation sentence in *Philippides* and held summary judgment to be proper. *Id.* at 1259.

3 The *Philippides* court never suggested that its single-sentence summation about
4 tortious death overturned the well-settled understanding that an estate may recover under
5 the general survival statute for economic damages due a decedent who leaves no statutory
6 beneficiaries. See, e.g., *Norberg*, 4 P.3d at 846; *Wooldridge*, 638 P.2d at 567; *Walton*,
7 676 P.2d at 1004; *Criscuola*, 507 P.2d at 150; *Balmer*, 502 P.2d at 458; *Warner*, 460
8 P.2d at 276; *Tait*, 987 P.2d at 131; *Cavazos*, 867 P.2d at 677; *Wagner v. Flightcraft, Inc.*,
9 643 P.2d 906, 912 (Wash. Ct. App. 1982). Cf. *Otani*, 92 P.3d at 195 (“[S]pecifically,
10 recovery under the general survival statute is for the benefit of, and passes through, the
11 decedent’s estate, whereas recovery under the special survival statute is for the benefit of,
12 and is distributed directly to, the statutory beneficiaries.”). The court, therefore, rejects
13 both Lockheed’s argument and the conclusion in *Rentz*.⁷
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15 III. CONCLUSION

16 For the reasons stated, the court DENIES Lockheed’s motion for summary
17 judgment (Dkt. # 40).

18 Dated this 27th day of September, 2007.

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22 JAMES L. ROBART
23 United States District Judge
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27 ⁷The court did not find particularly informative Lockheed’s discussion of a proposed bill
28 to amend RCW § 4.20.046 in light of *Philippides* and *Otani*. Reply at 5, Ex. A. Lockheed
would have been better served by discussing the legislative history of the statute actually in effect.